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IMMIGRATION SOLUTIONS

This is a publication of Landis & Arn, P.A., a law firm located in Portland, Maine devoted exclusively to the practice of immigration and naturalization law.

July 2008

The Perfect Storm: A Physician-Shortage Tsunami

Employing Foreign Medical Graduates To Alleviate The Worsening Physician-Shortage Crisis

by Peter J. Landis, Esquire

This is intended to be a brief overview of the process that is normally involved in hiring foreign medical graduates who are in the U.S. as J-1 exchange visitors pursuing postgraduate medical training. It is not intended to be comprehensive. This is a very complicated area of the law, and the facts of each case need to be fully assessed by experienced immigration counsel in order to develop an appropriate course of action and determine the likelihood of success.

Across the U.S. healthcare landscape, there is a growing physician-shortage crisis created by a confluence of factors coming together to create a perfect storm scenario. Since 1980, when U.S. medical schools put a cap on medical school enrollment, the number of newly trained physicians entering practice each year has stayed relatively constant (i.e. approximately 15,500). However, the U.S. population has continued to grow from more than 226 million people in 1980 to more than 281 million people in 2000; an increase of 24%. At the same time, the U.S. population is aging and people are living longer. The 2000 U.S. Census indicates that the age 60-plus population will quadruple by 2010 and, as of 2002, the U.S. life expectancy had increased to 77.3 years. As the baby boomer population begins to retire, so do its doctors, and because older Americans use medical services at a considerably higher rate than younger Americans, the demand for medical services continues to increase significantly. Experts predict a nationwide shortage of 50,000 to 85,000 physicians by 2010, which could increase to as high as 200,000 physicians by 2020. The growing shortage of physicians particularly impacts rural America, where 20% of the U.S. population resides but only 11% of U.S. physicians practice. The crisis is even more acute in primary care where only 20% of graduating residents choose to practice. According to the Maine Hospital Association, there are currently more than 200 physician vacancies in the State of Maine with at least 50% of those in primary care.

In an effort to alleviate the worsening physician

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I-9 Compliance and Employer Sanctions in an Era of Heightened Scrutiny

by Cynthia C. Arn, Esquire

As we discussed in our last newsletter, the Department of Homeland Security (DHS) now places a very high priority on ensuring that foreign nationals who work without authorization are apprehended and prosecuted, and that U.S. employers comply with requirements to properly verify employment authorization for all employees. Employers are required to verify on Form I-9, Employment Eligibility Verification, the identity and authorization to work of all employees. Failure to do so, and to do so properly, can result in substantial fines and, in egregious cases, criminal prosecution. The procedures for verification are quite specific and even minor "paperwork" violations may subject the employer to fines. **The I-9 form was revised effective *June 5, 2007*. As of December 26, 2007, prior versions are no longer acceptable for use.**

Which employees are subject to I-9 verification?

- All employees hired after November 6, 1986;
- All new hires, including workers referred by labor unions or recruiters; and
- Employees whose work authorization is due to expire – they must be re-verified on or before the expiration date.

Which employees are NOT subject?

- Casual hires: This category is *extremely* narrow and limited only to domestic services in a private home that are of a sporadic, irregular or incidental nature. Regularly scheduled in-home service is not casual hire. Those who work outside the actual house, such as persons performing yard work, are also excluded;
- Independent contractors: There are very specific factors, primarily related to the amount of control that the employer maintains over the individual, which will determine whether the person is an independent contractor or an employee. The IRS provides guidance on this: www.IRS.gov. (See also Form SS-8, available on that website.) Bear in mind also that, even where a worker qualifies as an independent contractor, an employer can still be subject to employer sanctions penalties if the employer has *actual knowledge* that the person is not authorized to work in the U.S.;

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Premium Processing Update

Starting June 16, 2008, USCIS began accepting Form I-907, Request for Premium Processing Service, for Form I-140 petitions (Immigrant Petition for Alien Worker) filed for beneficiaries who, as of the date of filing Form I-907, are currently in H-1B nonimmigrant status; will reach the 6th year of their H-1B nonimmigrant stay in 60 days; and are only eligible for a further H-1B extension because, upon approval of their Form I-140 petition, an immigrant visa is not immediately available to them.

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Problems with Alcohol? Ever Use Drugs?

How Drugs & Alcohol Can Mean Big Trouble for Immigration Processing

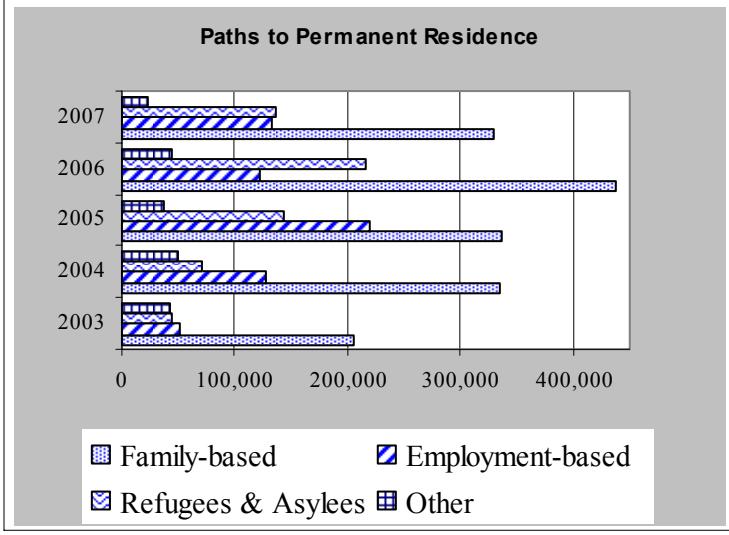
by Marcus B. Jaynes, Esquire

U.S. Citizenship and Immigration Services and the U.S. Department of State continue to intensify their focus on alcohol and drug use as they relate to immigration processing. Therefore, it is increasingly important that applicants for immigration status or U.S. visas understand the consequences that their personal, medical, and criminal histories may have for their ability to successfully complete their path to immigration status in the U.S. During an applicant's immigrant medical examination, the examining physician is required to ask routine questions regarding any psychoactive drug and alcohol use, any history of psychiatric illness or institutionalization, and any history of harmful behavior. Severe consequences can result for immigration processing, depending on a person's answers to the physician's questions and his or her driving/criminal history.

Under the Immigration and Nationality Act (INA), applicants for immigrant visas and adjustment of status to permanent residence ("green card" status), and some nonimmigrant visas, must have medical examinations to determine whether they have any health conditions that would make them "inadmissible," meaning they would be barred from immigration status in the United States. Among the problematic health conditions for immigration processing are illnesses such as tuberculosis, syphilis, and HIV. Also included among the illnesses that can result in inadmissibility are mental disorders related to behavior that can pose or already has imposed a threat to the property, safety, or welfare of the foreign national or others. Alcohol abuse and alcohol dependence have been defined by the U.S. Secretary of Health and Human Services to be included in these types of illnesses and can result in a bar to immigration status when associated with harmful behavior. Harmful behavior is defined as a dangerous action or series of actions that has resulted in injury (psychological or physical) to the foreign national or another person, that has threatened the health or safety of the foreign national or another person, or that has resulted in property damage. Controlled substance use/abuse can also result in inadmissibility, with or without association with harmful behavior.

Alcohol & Health-Related Inadmissibility

If an immigration medical examination results in a determination by the physician that a foreign national has a medical condition of alcohol abuse or alcohol dependence, along with harmful behavior, the foreign national will generally be found inadmissible. A record of arrests and/or convictions for alcohol-related driving incidents may be a trigger for additional questions regarding alcohol use, and can bolster a physician's or government officer's determination of the existence of harmful behavior.



Reexamination

Even if the initial medical exam turns out well, when an immigration officer reviews an applicant's paperwork and conducts an interview prior to status/visa approval, a medical reexamination may be required. This can be deemed necessary if it is apparent that the applicant has a significant criminal record of alcohol-related driving incidents that were not considered by the physician during the original medical examination. Specifically, alcohol-related driving incidents that also involve driving under suspension/revocation or injury to another party, as well as multiple arrests or convictions for alcohol-related driving incidents, and incidents classified as felonies can act as triggers.

An applicant's reexamination should be limited to a mental status evaluation, specifically involving the alcohol-related events. If the physician has indicated on the originally submitted medical examination form that these incidents were considered and no subsequent incidents have occurred, reexamination of the person will not be required. If the physician has properly examined the person for dangerous mental status due to alcohol-related events and made a determination that the applicant does not meet the criteria for medical inadmissibility, officers of USCIS or the Department of State cannot override this determination. In exceptional cases, however, if a government examiner objects to results of the medical examination, s/he may seek a review of the physician's findings by the U.S. Public Health Service.

Medical reexamination may also be required where other circumstances indicate a potential medical ground of inadmissibility that was not considered during the medical examination. Examples include: arrests/charges involving assault or domestic violence where alcohol or other psychoactive substances were a contributing factor; other crimes that may indicate a mental health disorder; or a history of hospitalization for mental health problems. In each of these cases, reexamination is only necessary if the medical examination results indicate that these special circumstances were not considered during the examination.

Waiver Still Available

A foreign national who is found inadmissible due to health-related factors may still file an I-601 waiver application, seeking an exception to inadmissibility based on special circumstances; approval is not guaranteed. Furthermore, the federal government may condition the waiver's approval upon certain terms, conditions, or controls, including the posting of a monetary bond.

Drugs & Health-Related Inadmissibility

If an immigration medical examination reveals a history of drug use (or drug-related criminal convictions), the examining physician will need to conduct an analysis to determine whether or not the applicant should be classified as inadmissible due to a medical condition as a drug abuser. If a physician concludes that a person is now engaging in non-medical use of a controlled substance or has done so within the past three years, the result can be a finding of a medical condition as a drug abuser, leading to inadmissibility without the availability of a waiver (in some instances, a single instance of experimentation can be forgiven).

Drugs, Alcohol, & Criminal Inadmissibility

A person who is not found inadmissible on health-related grounds

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Drugs (Continued from page 2)

due to alcohol or drug use may still be found inadmissible under the criminal provisions of the Immigration and Nationality Act. In addition to providing for inadmissibility based on crimes involving domestic violence, controlled substance violations, and weapons offenses (among others), the INA separately provides for inadmissibility in cases where an applicant has been convicted of a "crime involving moral turpitude." Generally speaking, a crime involves moral turpitude when the language of the statute involves specific intent (and in some cases, recklessness) with respect to the commission of a bad or malicious act, and proof of this mental state is required to sustain a conviction. (The classic example is a crime of theft, where the statute's language requires proof that the defendant intended to permanently deprive an owner of his or her property.) Many alcohol-related driving offenses are not considered to be crimes of moral turpitude, but where they include aggravating circumstances such as serious injury to persons or property, or coincidence with driving under suspension/revocation, the courts have found that these cases may well involve the malicious or depraved mental states that rise to the level of moral turpitude.

What to Do

Potential applicants for immigrant visas, adjustment of status, and certain other visa classifications should consult with a qualified immigration attorney if they have ever been arrested or if they have a history of alcohol or drug use. The attorneys at Landis & Arn, P.A., are prepared to evaluate cases involving these issues, to assist in determining whether health-related or criminal grounds of inadmissibility may apply, and whether any bars to immigration status can be overcome.

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Good Moral Character and U.S. Citizenship: Alcohol Abuse One of Many Potential Problems

In order to be approved for U.S. citizenship under the Immigration and Nationality Act, among other requirements, an applicant must be able to show that s/he has been a person of "good moral character" during the required 5-year (or 3-year) period of permanent residence immediately preceding the filing of an Application for Naturalization. Applicants may be unable to show good moral character in certain circumstances, including: where a person is or has ever been a "habitual drunkard"; where a person has been convicted of certain crimes, especially drug crimes and crimes designated as "aggravated felonies" under the INA; and where a person has committed immigration fraud.

Compliance (Continued from page 1)

- Internal transfers;
- Seasonal workers or other workers who are temporarily off the payroll;
- Certain rehires (if rehired within 3 years of initial completion of I-9 and still eligible to work); and
- Employees hired before 11/6/86.

Who is authorized to work in the U.S.?

The I-9 form sets out the 3 categories of individuals who may accept employment in the U.S.: U.S. citizens, lawful permanent resident ("LPR") aliens (also known as "green card" holders), and other non-U.S. citizens with authorization to work in the U.S. U.S. citizens and LPRs are authorized to work indefinitely for any employer. Other non-citizens may be time-limited in their authorization to work, or may be limited to working for specific employers.

When must the I-9 be completed?

Section 1 of the I-9 form must be completed by the employee on the first day of employment (or on the date of hire). The employer completes **section 2** within 3 business days of hire. The employer must examine the *original* documents. In signing the I-9 form, the employer is attesting that she has examined the documents; that the documents appear, on their face, to be genuine; that they relate to the individual presenting them; and that the employee is authorized to work in the U.S. The employer also verifies the date of hire for the employee in section 2.

What documents may be used?

A list of acceptable documents can be found on the reverse of the I-9 form. List A documents are those that establish both *identity* and *authorization to work*. Therefore, one List A document alone is sufficient for I-9 purposes. List B documents establish identity, and List C documents establish authorization to work. Thus, one item from each list is required to meet employment verification requirements.

The employee may choose, from among the acceptable documents, which to submit to the employer. The employer cannot require specific documents, or more or different documents, from those listed on Form I-9. For example, it may make the employer feel more secure to require that all U.S. citizens submit copies of their passports, but that is unacceptable.

Anti-Discrimination Requirements

The same law that introduced the requirement of employee verification (IRCA 1986) prohibits employers from discriminating on the basis of national origin or citizenship status in the hiring, recruiting, or discharging of individuals. Requiring certain individuals to provide before hire more or different documents than others, or keeping photocopies of the documents for some but not all employees, are just two examples of ways in which an employer may run afoul of the anti-discrimination requirements of the law.

Employer Sanctions

Even minor deficiencies in completing an I-9 form can result in an employer being cited for a "paperwork" violation and incurring a civil fine of $100 to $1,100 per employee. For unlawful hiring violations, penalties range from $275 to $2,200 per unauthorized alien for the first offense, up to $11,000 per unauthorized alien for the third or more offense.

If an employer engages in a "pattern or practice" of knowingly hiring or continuing to employ unauthorized workers, a criminal

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Tsunami *(Continued from page 1)*

shortage, many hospitals and medical facilities look to employ qualified foreign medical graduates, who currently comprise approximately 25% of all physicians undertaking postgraduate medical training in the U.S. Most often these physicians are in the U.S. as J-1 exchange visitors and need to obtain H-1B temporary worker status in order to begin working at the facility. However, §212(e) of the Immigration and Nationality Act prohibits any person who engages in postgraduate medical training in J-1 status from obtaining H-1B status (or lawful permanent residence) until s/he has either returned to his/her home country for at least two years or has obtained a waiver of the home residence requirement. Consequently, in order to employ a J-1 physician who has not satisfied the residence requirement, the facility must work with the physician to obtain a waiver. As a practical matter, the "Conrad 30" waiver program, which is administered by each state's department of public health or equivalent agency, provides the most viable option for obtaining a waiver of the home residence requirement.

Under the Conrad 30 program, each state may sponsor up to thirty waiver applications per fiscal year for physicians who agree to work at medical facilities located within geographical areas designated by the Secretary of Health and Human Services as medically underserved. Most states do not restrict their waiver programs only to primary care physicians but will also support applications on behalf of specialists who agree to work in medically underserved areas. Further, five of the thirty waiver slots may be used to sponsor physicians who agree to work at facilities that are not physically located within a medically underserved area but serve a significant number of patients who either reside in medically underserved areas and/or are low-income. In order to qualify for a Conrad 30 waiver, the physician must agree to provide medical care for at least forty hours per week for a minimum of three years at the medical facility and must agree to start work within ninety days of the time the J-1 waiver is granted.

The physician initiates the waiver process by filing a waiver application with the U.S. Department of State (DOS). The medical facility then files a sponsorship request with the department of health or equivalent agency in the state of intended employment. If the department of health determines the employment to be in the public interest, it will forward a waiver request to DOS, which will then forward the application with a favorable recommendation to U.S. Citizenship and Immigration Services (USCIS) for final adjudication. Upon approving the waiver request, USCIS will issue an approval notice granting the physician and his/her dependents (J-2) a waiver of the two-year home residence requirement.

Before the physician may begin working, however, the medical facility must file an H-1B petition with USCIS and obtain its approval. H-1B status permits the physician to work *only* for the petitioning employer in the capacity described in the H-1B petition; it may be granted for an initial period of up to three years and may be extended for three additional years for a maximum allowable stay of six years in the H-1B category. The physician's dependents are eligible for H-4 status for a period corresponding to the physician's approved period of H-1B status, but H-4 dependents are not authorized to accept employment.

After the physician has completed the three-year J-1 waiver service obligation in H-1B status, s/he is free to move to other H-1B employment. However, failure to complete the service obligation with the medical facility that sponsored the waiver will result in the physician again becoming subject to the two-year home residence requirement of Section 212(e) of the Act. USCIS will excuse a failure to complete the requirement with the sponsoring facility only in very limited instances, which require the physician to establish that there are extenuating circumstances justifying an early termination of employment.

Lawful Permanent Resident Status

There are two primary avenues for obtaining lawful permanent residence for J-1 waiver physicians: labor certification and the National Interest Waiver (NIW). The labor certification route is a three-step process, the first of which involves filing a PERM labor certification application with the U.S. Department of Labor (DOL) and requires the employer to conduct a test of the labor market in accordance with DOL guidelines to establish that there are no minimally qualified U.S. workers who are willing and available to fill the position. After the PERM application is approved, the employer will file an I-140 Immigrant Visa Petition with USCIS. As part of the petition, the employer must submit documentation showing the financial ability to pay the offered salary since the time the labor certification application was filed. The third and final step of the process is for the physician and his/her eligible family members to file I-485 Adjustment of Status Applications to change their status from nonimmigrant to permanent resident. If the physician pursues the labor certification route, s/he may not file the I-485 Applications until s/he completes the entire three-year J-1 waiver service obligation.

The NIW route allows the physician to skip the labor certification step and immediately file the I-140 Petition on the basis that his/her employment in a medically underserved area is in the national interest. One of the primary benefits of the NIW is that it enables the physician and his/her eligible family members to file the I-485 Applications prior to the completion of the three-year service obligation and allows H-4 dependents to obtain employment authorization. On the other hand, the NIW route extends the physician's service obligation from three to five years, and permanent residence will not be granted until the physician completes the five years of qualifying employment.

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Two-Year Employment Authorization Documents

The new two-year EAD is only available to individuals who have an approved I-140 Petition and who concurrently filed for permanent residence using Form I-485 and for employment authorization under 8 C.F.R. § 274.a.12(c)(9) but for whom an immigrant visa number is not currently available. If the I-140 is still pending, USCIS will only issue a 1-year EAD card.

U.S. Citizenship Naturalization Test Redesign

U.S. Citizenship and Immigration Services ("USCIS") has announced the release of a new naturalization exam. The goal in revising the examination was to make it "standardized, fair and meaningful." Prospective citizens filing their applications after October 1, 2008, or whose naturalization interviews take place after October 1, 2009, will take the redesigned test.

Compliance *(Continued from page 3)*

penalty is provided of up to $3,000 per unauthorized worker (in addition to other civil penalties assessed) plus up to six month's imprisonment for individual officials of the employer who engaged in the overall pattern or practice violation. In addition, the U.S. Attorney General may bring a civil action against the employer requesting relief, including a permanent or temporary injunction, restraining order, or other order against the employer. A "pattern or practice" charge is possible where U.S. Customs and Immigration Enforcement (ICE) has advised an employer of multiple violations of knowingly hiring or continuing to employ unauthorized workers and the employer takes no action and simply continues business as usual.

The best way to safeguard against this type of liability is for the employer to develop and diligently use an I-9 employment eligibility verification system. If I-9 forms are properly completed and retained, employers will generally be protected from both paperwork and "knowing hire" charges. There are certain steps that employers should also undertake to help ensure they can establish their "good faith compliance" with the employment verification requirements in case DHS comes knocking on their door.

Common I-9 Errors

- The **employer representative** who reviews the verification documents is not the same employer representative who signs the I-9 form;
- The **employee** or the **employer** fails to **sign and date** the I-9 form in their respective sections;
- The **employee** does not complete Section 1 of the I-9 form on (or before) the **day employment begins**;
- The **employer** does not review *original* documents and does not complete Section 2 of the I-9 form on or before the **third business day of employment**;
- The **employer** fails to insert the employee's **start date** for work in the "CERTIFICATION" block of Section 2;
- The **employee** does not **check one of the three blocks in Section 1** attesting to his or her status in the United States or does not provide the required information for the second and third blocks. *This is especially crucial where the employee checks "box 3" as a non-citizen/non-permanent resident worker. If the third block is checked, the alien number/admission number and expiration date of temporary employment authorization must be listed*;
- The **employer** fails to keep track of the **expiration date** of a "box 3" employee's temporary, time-limited **work authorization** for purposes of conducting mandatory re-verification. *Failure to re-verify is a serious paperwork violation and also may subject the employer to a "knowing hire" violation if the alien employee in fact had no continuing work authorization*;
- The **employer** lists **too many** identity and/or employment authorization **documents** in Section 2. The I-9 form should include only **one** document from **List A**, **or one** document from **List B AND one** document from **List C**. Listing more than this is considered "over-documenting" and could result in a **discrimination charge** against the employer ;
- The **employer** fails to ensure that the employee's verification documents "appear on their face to be genuine**."** The employer should look to see that the type style on the document is consistent and does not contain obvious "white-outs" or type-overs. Employers do not have to be forensic document specialists, but they do need to apply general knowledge and common sense.
- The **employer** reviews photocopies of the employee's verification documents rather than **original** documents, as required. *The employee is required to present in person his or her original verification documents to the employer representative. The employer representative should **never** **accept photocopies of documents** for I-9 verification purposes*;
- The **employer** fails to ensure that the employee's verification **documents** actually **relate to the employee**. That is, information contained in the documents does not match other information available to the employer about the employee. *The employer should look for a match in the employee's name and date of birth on the documents and review any other descriptive information on the documents and make a visual comparison with the employee*;
- The **employer** fails to **keep copies of verification documents** presented either for **all** employees **or** for **none at all**. The law permits, but does not require, employers to make copies of the employee's verification documents to attach to the I-9 form. It is important that the employer's policy in this regard be standardized and applied consistently for all employees. It is also a violation to make document copies and keep them somewhere other than with the relating I-9 form; and
- The **employer** does not keep the I-9 records separate from its general personnel records. Because I-9 records may contain information on an employee's age, national origin and citizenship status, maintaining separate I-9 records can help employers avoid the appearance that some later personnel action was impermissibly tainted by information from the I-9 form. Moreover, as a practical matter, keeping I-9 records segregated allows an employer to assemble these records quickly in response to a DOL or DHS inspection or audit.

Conclusion

Recent increased efforts by DHS to enforce this country's immigration laws bolstered by much higher levels of funding have resulted in a dramatic step up in worksite enforcement. The best way for employers to protect themselves from an audit and potential sanctions is threefold: first, establish an I-9 compliance policy and train staff in the proper implementation of that policy; second, review current I-9s for compliance with the law and take proper steps to correct any deficiencies; and third, keep pace with developments in this rapidly changing area of employment law.

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Join us for our next I-9 Compliance Seminar:
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Contact Jan Reny at jmr@landisarn.com for more information or to register.
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